



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES

MISCELLANEOUS APPLICATION NO. 4 OF 2017

IN THE MATTER OF : AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR ORDERS UNDER SECTIONS 90 AND 92 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES FOR ORDERS OF FORFEITING PROPERTY KNOWN AS DUPLEX APARTMENT NUMBER C16 SITUATED ON LR NO. 209/59990/13 GRANT NO. 18295/9 AND KSHS.8,800,000

BETWEEN

THE ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

QUORANDUM LIMITED.....1ST RESPONDENT

EZEKIEL OTIENO OWOUR.....2ND RESPONDENT

AND

DUCHESS PARK DEVELOPMENT

COMPANY LIMITED.....INTERESTED PARTY

RULING

1 The 2nd Respondent filed the Notice of Motion dated 22nd October 2018 under order 42 Rule 6 and order 51 Rule (1) of the Civil Procedure Rules 2010. He seeks an order of stay of execution of this court's judgment of 21st September 2018 pending the hearing and determination of an appeal he intends to file in the Court of Appeal.

2 The application is premised on the eight (8) grounds on the face of the application and the supporting affidavit of Ezekiel Otieno Owuor the 2nd Respondent/Applicant. The grounds cited are as follows:

(i) By a Judgment delivered on 21st September 2018 the court found in favour of the Applicant and issued an order of forfeiture of Kshs 8,800,000.00 which money is to be recovered by the Applicant from the 2nd Respondent.

(ii) The 2nd Respondent/Applicant is aggrieved by the Judgment of 21st September 2018 and has appealed to the Court of Appeal as of right.

(iii) The Applicant has now extracted the decree emanating from the Judgment and proceeded to serve the 2nd respondent on 8th October 2018. It is therefore beyond constestation that the Applicant is about to commence the execution proceedings anytime from now as there is no order of stay as against the Judgment of the court.

(iv) The Applicant/Respondent will pursue the 2nd Respondents/Applicant assets which are not related to the transaction giving raise to the proceedings herein, if stay is not granted the Application and the intended appeal shall be rendered an academic exercise.

(v) The 2nd Respondent/Applicant will suffer irreparable loss and harm unless the order of stay of execution is granted by this Honorable court.

(vi) *The 2nd respondent/Applicant is ready to abide by such terms and conditions as may be imposed by the court on stay, in the interests of justice.*

(vii) *This Application has been brought timeously and without delay.*

(viii) *It is in the interest of justice that the orders sought herein be granted.*

3 He has averred that he filed a Notice of Appeal in the Court of Appeal (EOO) and a letter requesting for proceedings (EOO-2).

4 He has also averred that the Applicant/Respondent has extracted the decree in the matter and is preparing for execution of the same. He fears losing the money in contention which would render the Appeal moot. He annexed a copy of the decree EOO3. He further depones that he stands to suffer irreparably if the decretal sum is paid to the Respondent as it may be extremely difficult and even impossible to get the money back in the event of a successful Appeal.

5 Mr Malenya for the 2nd Respondent/Applicant in his submissions said there was judgment in favour of the 2nd Respondent/Applicant and both Respondents have filed Notices of appeal against the judgment of this court. He argued that the Applicant has complied with the requirements of Order 42 rule 6 Civil Procedure Rules as the application was filed within reasonable time.

6 He submitted that if stay is not granted, the Applicant will suffer substantial loss. He relied on the case of **Antoine Ndiaye vs African Virtual university – Nairobi High Court Commercial & Admiralty Division Civil suit No 422 of 2006** in support of his application.

7 He submitted that under section 92 (6) (b) POCAMLA an order of forfeiture will not take effect unless an Appeal filed has been disposed of. He argued that once an order of forfeiture has been effected there is no reversal from the Consolidated Fund whose money is dealt with under article 206 of the Constitution.

8 He further submitted that an order of stay is discretionary and the 2nd Respondent/Applicant is ready and willing to comply with any orders to be given by the Court. He further added that both parties had opened an escrow account and the Applicant is willing to make deposits there. He confirmed having made a deposit of Kshs 200,000/.

9 Counsel submitted that though the 1st Respondent had not made any application but it relied on section 92(6)(b) of POCAMLA.

10 The application was opposed by the Applicant/Respondent who filed grounds of opposition dated 12th Novembers 2018. The grounds were that the Applicant did not disclose any appealable grounds nor any imminent threat posed by the Applicant/Respondent through the judgment. Finally that the application was an abuse of the court process.

11 Mr Adow for the Applicant/Respondent in his submissions relying on the case of **Masisi Mwita vs Damaris Wanjiku Njeri- Muranga HCCC Appeal No 107 of 2015** stated the money in issue are proceeds of crime. That the 2nd Respondent had put in place a process of recovery and so will not suffer any loss as this is not his money.

12 Counsel further submitted that there was no memo of appeal attached to their application yet their arguments were for the Court of Appeal. On the issue of the refund by the Government he submitted that the Government was not poor and it could pay the money if this court's judgment was overturned.

Determination

13 The application has been under Order 42 Rule (6) and Order 51 Rule (1) Civil Procedure Rules 2010. Order 42 Rule 6(1) and (2) Civil Procedure Rules provides as follows:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is

preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as

may ultimately be binding on him has been given by the applicant.

14 The above provision of the law sets out the conditions one must satisfy before grant of an order of stay pending an appeal. I have

considered the application, affidavit, grounds of opposition, authorities cited and submissions. The issue falling for determination is whether the 2nd Respondent/Applicant has satisfied the conditions under Order 42 Rule 6 Civil Procedure Rules.

Was the application made timeously?

Judgment herein was delivered on 21st September 2018. The application for stay was filed on 24th October 2018 though it is dated 22nd October 2018. The decree was drawn on 24th September 2018. I therefore find that the application was made without delay

Would substantial loss occur if stay is not granted?

15 Both parties have submitted on this. The 2nd Respondent/Applicant was adjudged to pay a sum of Kshs 8 Million allegedly received as a loan from the 1st Respondent while the 1st Respondent was adjudged to surrender property found to be proceeds of crime. The 1st Respondent did not file any application seeking stay of execution. It was however submitted that it relied on section 92(6) (b) of POCAMLA.

16 As matters stand before me, what loss have the 1st and 2nd Respondents in this case shown that they would suffer if the stay is not granted? All that the 2nd Respondents has stated is that he fears that he may lose his money in the event of a successful Appeal. Can this in itself amount to substantial loss?

17 Justice Gikonyo in the case of James Wangalwa & Anor vs Agnes Naliaka Cheseto H.C. Misc. No 42 of 2012 OR [2012] eKLR explained what substantial loss is. He held *inter alia* that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This I what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs Chesoni... the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18 The 2nd Respondent/Applicant does not deny receiving Kshs 8 million. The Court found the money to have been corruptly acquired by the source of the loan. So from whichever angle the 2nd Respondent/Applicant looks at it he has to refund the money whether as a loan or proceeds of crime. There is no substantial loss he will suffer if the money reverts to Government through the Consolidated Fund. His claim that money can never leave the Consolidated Fund to meet such a payment is neither here nor there. If he succeeds in his Appeal an order will be made for the refund of the money and whoever will be holding it will have to release it whether it is ARA, the Consolidated Fund or Treasury.

19 In any event Government is the best place to have that money. He has not shown that the Government of Kenya is too broke to repay Kshs 8 million if found to be due to him. Besides the fact that the 2nd Respondent/Applicant has filed a notice of Appeal against this Court’s judgment, and execution is eminent, the said Applicant has not shown any substantial loss to be suffered by him if stay is not granted.

19 The 1st Respondent did not make any application for stay of execution though Mr. Malenya told the court that the said 1st Respondent relied on section 92 (6) (b) of POCAMLA which provides:

(6) A forfeiture order shall not take effect—

(a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or

(b) before such an application or appeal has been disposed of.

It is clear that the Appeal mentioned in section 92 (6) (b) is in respect to orders made under sections 89 and 96 of POCAMLA. The 1st Respondent herein does not fall under the categories specified under sections 89 and 96 of POCAMLA, as he is one of the parties in this case.

20 The 2nd Respondent/Applicant’s counsel submitted that he is willing to abide by any conditions to be given by this court. I have noted that there were negotiations that culminated in the Applicant/Respondent and 2nd Respondent/Applicant agreeing on the following terms.

(i) The 2nd Respondent/Applicant to pay a deposit of Kshs 500,000/- in two instalments.

(ii) Monthly instalments of 250,000/-

21 Counsel submitted that he had only paid Kshs 200,000/- a confirmation that an escrow account had been opened but the 2nd Respondent has not complied with the consent. This clearly confirms to this court that the 2nd Respondent/Applicant is not a man of his word.

22 In spite of all these findings, I would give him a second chance by granting stay of execution on the following conditions.

(i) The 2nd Respondent/Applicant to complete payment of the agreed deposit into the escrow account within 14 days from the date of this Ruling.

(ii) The monthly payments of Kshs 250,000/- to commence w.e.f 28th December 2018, and thereafter on or before the 28th day of every succeeding Month until payment in full or the determination of the Appeal or whichever comes earlier.

23 In the event of any default the stay of execution in respect to the 2nd Respondent/Applicant shall be lifted with immediate effect. No order as to costs.

Orders accordingly.

Dated, signed and delivered this 23rd day of November 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

JUDGE